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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1326

BRONZIE L. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, BRONZIE L. CARTER, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 3, 1978. The Fifth Circuit opinion affirmed a judgment entered by the United States District Court for the Middle District of Florida in a criminal prosecution brought by the United States against the petitioner. The opinion of the United States Court of Appeals for the Fifth Circuit upheld the District Court's denial of a motion to suppress tangible evidence seized by federal and local law enforcement agents executing

a federal search warrant at the petitioner's residence. This opinion also upheld the District Court's denial of petitioner's motion for new trial on the grounds that the government failed to disclose relevant impeachment evidence concerning its key witness and government witnesses deliberately gave misleading testimony concerning such evidence at the petitioner's trial. Finally, the Fifth Circuit's opinion also upheld the supplemental jury instruction which the trial judge gave to petitioner's jury after it reported that it was deadlocked. The petitioner now prays that this Court review this judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The February 3, 1978, opinion of the United States Court of Appeals for the Fifth Circuit is reported at 566 F.2d 1265. The slip sheet opinion is set out in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1978, affirming the trial court's judgment of convictions and order denying the motion for new trial. On February 23, 1978, Mr. Justice Powell extended the time for filing this petition for writ of certiorari to and including March 20, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's supplemental instruction to petitioner's deadlocked jury, in an effort to coerce a verdict, violated due process of law.

2. Whether there is any exception to the announcement and refusal of admittance requirements of 18 U.S.C. §3109 and, if so, whether such an exception was properly applied by the lower court.

3. Whether this Court's due process "reasonable likelihood standard," enunciated in *Giglio v. United States*, 405 U.S. 150 (1972), was properly applied by the lower court when federal law enforcement officers deliberately gave misleading testimony concerning inducements given to a key prosecution witness and the federal prosecutor did not correct the false impression thereby created.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall *** be deprived of life, liberty, or property, without due process of law; ***.

United States Code, Title 18:

§3109. Breaking doors or windows for entry or exit:

> The officer may break open any outer or inner door or window of a house *** to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

STATEMENT OF THE CASE

The petitioner was the defendant in a criminal prosecution instituted in the United States District Court for the Middle District of Florida. Petitioner was found guilty by a jury of unlawfully distributing heroin in violation of 21 U.S.C. §841(a)(1) and of conspiring to unlawfully distribute heroin in violation of 21 U.S.C. §846. A judgment was entered by the District Court and sentences were imposed.

Prior to trial, a timely motion seeking the suppression of tangible evidence seized from the petitioner's residence was filed. The District Court denied this motion after an evidentiary hearing.

Testimony at the evidentiary hearing revealed that the petitioner's residence was a mobile home located in a sparsely populated rural area at the end of a dirt road. Shortly before midnight approximately 15 to 20 federal and local law enforcement officers, in numerous vehicles, arrived on petitioner's premises for the purpose of executing a federal search warrant for heroin. These officers drove unmarked police cars and were not in uniform. Some of the officers wore long hair and beards.

The lead police vehicle stopped 15 or 20 feet from the mobile home, and the police officers saw a man, who was standing outside the mobile home, run away from them. This man did not say anything to the occupants of the home. The lead officer testified that when he was about 15 feet from the mobile home he yelled "Sheriff's Department with a search warrant," and he repeated this statement when he reached the door of the house. This officer did not knock nor even hesitate when he got to the front door but abruptly pushed open the door and entered the home with a pistol in his hand. However, he testified that before

he entered the house he heard footsteps inside the house that sounded to him like someone was running away from the front door. He also testified that he heard someone inside the house yell "It's the cops" before he gave his second announcement.

Although the District Court found that the police officer's execution of the search warrant was not in "literal compliance" with 18 U.S.C. §3109's announcement and refusal of admittance requirements, the petitioner's motion to suppress the tangible evidence seized was denied because the District Court found that "exigent circumstances" justified the failure of the officers to comply with that statute.

In affirming the petitioner's convictions, the United States Court of Appeals for the Fifth Circuit first held that there are circumstances whereby compliance with Section 3109 is excused (slip sheet opinion at 1984-85; App. 4a-5a). The Fifth Circuit then concluded that the officer's failure to comply with the terms of that statute was justified by the exigencies of the situation (slip sheet opinion at 1985; App. 5a). In so concluding, the Fifth Circuit relied upon three factors: (1) the officer had reason to believe that the person who ran away from the home had detected the officer's presence; (2) the officer was justified in being "virtually certain" that the persons inside the home knew his purpose because he heard someone from within announce the officers' presence and he heard footsteps running away from the front door thereby making compliance with Section 3109 a "useless gesture;" and (3) the officer was concerned about the possible destruction of evidence because heroin is a readily disposable item.

At the petitioner's trial, the key witness against him was Italiano who had sold heroin to Goode and Kelsey, undercover police officers working on behalf of the United States

Drug Enforcement Administration (DEA) Task Force. Italiano's testimony was crucial because he stated he had direct dealings with the petitioner in connection with the procurement of heroin and its resale.

Italiano was arrested by DEA agents on the same night that other agents executed the search warrant at the petitioner's home and arrested him. Prior to the petitioner's trial, Italiano had been convicted on seven counts of illegally distributing heroin which he allegedly procured from the petitioner; and he was awaiting sentencing at the time that he testified against the petitioner.

Subsequent to Italiano's arrest, but prior to his testimony against the petitioner, agent Kelsey had told Italiano that he would advise the District Court and the United States Attorney of Italiano's cooperation if Italiano would testify against the petitioner. Three days prior to the petitioner's trial, agent Goode promised Italiano that Goode would inform Italiano's sentencing judge of Italiano's cooperation.

During the petitioner's trial, defense counsel asked Italiano on cross-examination whether he had ever been offered anything in return for his testimony. Italiano responded that he had not. In response to further questioning by the defense counsel, however, Italiano testified that he had been convicted of selling heroin and that he thought "it might go lighter on [him]" if he testified against the petitioner. Italiano further testified that neither Goode nor Kelsey promised him anything for testifying against the petitioner but that they had suggested to him that they would "help [him] out" if he did so. Goode testified on cross-examination that he had never approached Italiano about a possible "deal" in exchange for his testimony and that Goode had never been with Kelsey when Kelsey had done so. Kelsey

testified on cross-examination that he had never made any "overtures" to Italiano about what he might be able to do for Italiano if he testified against the petitioner.

After the petitioner's trial, Italiano gave a sworn statement to petitioner's appellate counsel in which he asserted that he had testified against the petitioner because he had been coerced and threatened by the prosecutor and by DEA agents and because he had been offered inducements and lenient treatment in return for his testimony. The petitioner then filed a motion for new trial in the District Court alleging that his constitutional right to due process and to a fair trial was violated by the prosecutor's failure to reveal this material impeachment evidence and by the prosecutor's failure to correct the misleading testimony by Italiano, Goode, and Kelsey. After an evidentiary hearing, the Court denied the motion for new trial, holding that there was no reasonable likelihood that the jury verdict would have been affected by disclosure of the information that was suppressed by the government.

The petitioner's appeal from the District Court's order denying his motion for new trial was consolidated with his direct appeal from his convictions by an order of the United States Court of Appeals for the Fifth Circuit.

In upholding the District Court's order denying the motion for new trial, the Fifth Circuit said:

> We do not determine whether Agent Goode's and Agent Kelsey's testimonies were perjurious or non-perjurious in the strict legal definition of perjury. *** The Agents did not candidly respond to the defense counsel's questions, and the prosecuting attorney did nothing to correct

> the Agents' evasive testimonies. (slip sheet opinion at 1987; App. 7a).

The Fifth Circuit then applied the standard of review first enunciated by this Court in *Giglio v. United States,* 405 U.S. 150 (1972), that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. Applying that standard, the Fifth Circuit held that although Goode and Kelsey did not reveal that they had attempted to induce Italiano to testify against the petitioner, Italiano himself apprised the jury that he expected to benefit by testifying and that Goode and Kelsey had suggested to him that it would be in "his best interest" to do so. Therefore, the Fifth Circuit ruled that more candid disclosure by Goode and Kelsey would not have been reasonably likely to have affected the jury's *verdict* (slip sheet opinion at 1987; App. 7a).

However, the Fifth Circuit went on to say:

> Although we affirm the district court's holding, we condemn the Government's use of misleading testimony. The due process clause of the Fifth Amendment mandates that each defendant shall receive a fair trial. Although the Government has an obligation to prosecute cases zealously, the Government's primary obligation is to try each case fairly and with due regard for the accused's rights. The witnesses yielded to a temptation to evade; the Government's counsel ought not have done so. (slip sheet opinion at 1988; App. 8a).

The petitioner's trial took nearly two days. The jury commenced its deliberation shortly after noon and four and one-half hours later notified the trial judge that they were unable to reach a verdict. The judge instructed the jury to continue deliberating until 6:00 p.m. At that time the jury reported that they were still deadlocked, and the trial judge excused the jury for the evening. When the jury returned the following morning, the trial judge, over the petitioner's objection, gave the deadlocked jury a supplemental instruction commonly known as an "*Allen* instruction" or "dynamite charge" in which he urged the jurors to reconsider their positions in an effort to reach a verdict.

This supplemental instruction contained the following language:

* * *

> The very object of the jury system is to secure unanimity by comparision of views and by arguments among the jurors themselves.
>
> Each juror should listen with deference to the arguments of the other jurors and with a willingness to question his own judgment if he finds the larger majority of the jury takes a different view of the case than that which he himself takes. *** (trial transcript at 528).

The instruction, in its entirety, contained language nearly identical to that approved by the Fifth Circuit in *United States v. Bailey*, 468 F.2d 652, 657 n. 5 (5 Cir. 1972), *aff'd en banc*, 480 F.2d 518 (5 Cir. 1973). However, this instruction admonished only the minority to re-examine its position. The trial judge did not instruct the jury that

they need not surrender an honest conviction about the case simply because the other jurors disagreed, and he did not reinstruct the jury on the reasonable doubt standard. Approximately one and one-half hours after receiving this supplemental instruction the jury returned its two guilty verdicts against the petitioner.

The Fifth Circuit held that the supplemental jury instruction given to petitioner's deadlocked jury was not reversible error because the instruction was within the limits of the *Bailey* decision (slip sheet opinion at 1989; App. 9a).

REASONS FOR GRANTING THE WRIT

I.

THE SUPPLEMENTAL INSTRUCTION GIVEN TO THE PETITIONER'S DEADLOCKED JURY, IN AN EFFORT TO COERCE A VERDICT, VIOLATED DUE PROCESS OF LAW.

Since its cursory approval by this Court over 80 years ago in *Allen v. United States*, 164 U.S. 492 (1896), the supplemental jury charge known as the "*Allen* instruction" or the "dynamite charge" has come under increasing criticism and abandonment by lower federal courts and state courts. Three federal circuits have disapproved the instruction entirely. *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *United States v. Fioravanti*, 412 F.2d 407 (3 Cir. 1969), *cert. denied*, 396 U.S. 837 (1969); *United States v. Brown*, 411 F.2d 930 (7 Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970). Numerous states have also outlawed the giving of such a supplemental instruction. *See, e.g., State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959); *People v. Gainer*, 22 Crim.L.Rep. 2011 (Calif. Sup. Ct., August 31, 1977); *State v. Nicholson*, 315 So.2d 639 (La. 1975); *State*

v. Randall, 137 Mont. 534, 353 P.2d 1354 (1960); *Commonwealth v. Spencer*, 442 Pa. 328, 275 A.2d 299 (1971).

The American Bar Association has recommended that a modified *Allen* instruction be given only if such an instruction is also given to the jury before it retires for deliberation. American Bar Association, *Standards Relating to Trial by Jury*, §5.4 (approved draft 1968). Many of the federal circuits that have not abandoned the *Allen* instruction completely have approved modified instructions that comply with the American Bar Association recommendation. *See, e.g., United States v. Scott*, 547 F.2d 334 (6 Cir. 1977); *United States v. Flannery*, 451 F.2d 880 (1 Cir. 1971); *United States v. Sawyers*, 423 F.2d 1335 (4 Cir. 1970); *United States v. Sullivan*, 414 F.2d 714 (9 Cir. 1969); *United States v. Rao*, 394 F.2d 354 (2 Cir. 1968), *cert. denied*, 393 U.S. 845 (1968).

It appears that every federal circuit except the Fifth Circuit has either forbidden the use of this type of supplemental instruction or required trial judges to modify the original instruction so as to insure fairness to the defendant. The instruction given here was affirmed by the Fifth Circuit merely because the trial judge tracked the language of the instruction approved in *United States v. Bailey*, 468 F.2d 652 (5 Cir. 1972), *aff'd en banc*, 480 F.2d 518 (5 Cir. 1973). However, the instruction approved in this case directly conflicts with the federal cases cited above.

The instruction given in this case was unconstitutionally coercive because it singled out the minority of the jurors and directed them alone to re-examine their position. This feature of the *Allen* instruction has been repeatedly criticized. *United States v. DeStefano*, 476 F.2d 324, 334 (7 Cir. 1973); *United States v. Flannery, supra* at 883; *United States v.*

Thomas, supra at 1185; *United States v. Fioravanti, supra* at 417. Furthermore, this instruction did not remind the jurors that they were not to surrender their honest convictions as to the weight or effect of the evidence solely because of the opinion of other jurors, and it did not remind the jurors as to the reasonable doubt standard. Consequently, the petitioner was denied due process of law and a fair trial as guaranteed by the Fifth Amendment because this supplemental instruction deprived him of a unanimous verdict based on proof beyond a reasonable doubt.

Thus, the conflict between the Fifth Circuit's decision and the decisions of the other federal circuits is significant. This conflict justifies the grant of certiorari to review the judgment below. Furthermore, the decision below raises important and reoccurring problems concerning the continued vitality and content of supplemental instructions to a deadlocked jury.

II.

EVEN IF THERE IS AN EXIGENT CIRCUMSTANCES OR USELESS GESTURE EXCEPTION TO 18 U.S.C. §3109, SUCH AN EXCEPTION WAS IMPROPERLY APPLIED BY THE LOWER COURT.

This Court has never engrafted an "exigent circumstances" or "useless gesture" exception onto the specific statutory command of 18 U.S.C. §3109. In *Miller v. United States,* 357 U.S. 301 (1958), this Court, although referring to an "exigent circumstances" theory, failed to adopt such an exception to that statute. *Ker v. California,* 374 U.S. 23 (1963), involved a state statute similar to Section 3109, but this Court's decision rested upon state law providing for exigent circumstances which were held to be not unreasonable under the Fourth Amendment. Finally, in *Sabbath v.*

United States, 391 U.S. 585 (1968), without deciding the primary issue of whether or not such an exception existed, this Court referred to the *dissenting* opinion in *Ker* and said in a footnote:

> Exceptions to any possible constitutional rule relating to announcement and entry have been recognized *** and there is little reason why those limited exceptions might not also apply to §3109, since they existed at common law, of which the statute is a codification. 391 U.S. at 591 n. 8.

Nevertheless, the Fifth Circuit here engrafted an "exigent circumstances" and "useless gesture" exception onto Section 3109 despite the failure of this Court to specifically sanction such exceptions. In so ruling, the Fifth Circuit added to the confusion which already exists in the lower federal courts as to whether there are any exceptions to Section 3109 and, if so, the breadth and scope of such exceptions. *See, e.g., United States v. Agrusa*, 541 F.2d 690, 700-701 (8 Cir. 1976); *United States v. Smith*, 520 F.2d 74 (D.C. Cir. 1975), *appeal after remand*, 524 F.2d 1287 (D.C. Cir. 1975); *United States v. Likas*, 448 F.2d 607 (7 Cir. 1971).

The court below, in applying the "exigent circumstances" and "useless gesture" exceptions to Section 3109 relied upon three factors: the movement away from the mobile home by the person standing outside; the voice from inside the home announcing the officers' presence and the sound of people running away from the front door; and the searching officer's concern about the possible destruction of the object of the search warrant: heroin. Moreover, even if this Court's decisions in *Miller*, *Ker*, and *Sabbath* are said to

have created exceptions to the announcement statute, the Fifth Circuit's decision here goes beyond the parameters previously permitted by this Court.

First, merely because the object of the search is readily disposable contraband does not create an automatic exception to the requirements of Section 3109. *Sabbath v. United States,* 391 U.S. 585 (1968) (officers' entry into apartment violated Section 3109 because they did not first announce their identity and purpose even though the object of the search was an ounce of cocaine). Second, the movement of the individual away from the front of the mobile home was an ambiguous act similar to the ambiguous conduct in *Miller v. United States,* 357 U.S. 301 (1958), which this Court held did not give rise to an "exigent circumstance". Finally, the voice and noise which the searching officer heard from inside the home did not make the statutorily required announcement of authority and purpose a "useless gesture". To take advantage of such an exception there must be facts known to the officer which would justify him in being "virtually certain" that those inside the home already know his authority and purpose. *Miller v. United States, supra* at 313-314. Since the searching officer announced his purpose and authority for the second time after he heard the noise and voice from within, it cannot be said that he was virtually certain that compliance with the statute would be a useless gesture.

The broad scope of the Fifth Circuit's decision here has the practical effect of judicially repealing Section 3109 and making its requirements a nullity. Therefore, this Court must grant certiorari so as to resolve the continuing confusion and uncertainty in the lower federal courts as to whether there are any exceptions to the requirements of Section 3109 and, if so, the precise scope and breadth of

such exceptions. This confusion is of continuing importance because of its direct impact on the day-to-day conduct of law enforcement officers in the execution of federal search warrants.

III.

THE LOWER COURT MISAPPLIED THIS COURT'S DUE PROCESS "REASONABLE LIKELIHOOD" STANDARD FOR GRANTING A NEW TRIAL ENUNCIATED IN *GIGLIO v. UNITED STATES*, 405 U.S. 150 (1972).

The Fifth Circuit, confronted with a situation in which federal law enforcement officers gave highly misleading, if not false, testimony to the petitioner's jury concerning the benefits which the key prosecution witness expected for his testimony and where the federal prosecutor allowed such testimony to remain uncorrected, tacitly found that the government had not lived up to its obligation under the rule announced by this Court in *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959) (slip sheet opinion at 1987, App. 7a). However, the Fifth Circuit refused to reverse petitioner's convictions and affirmed the District Court's order denying a new trial because the Fifth Circuit believed there was no "reasonable likelihood" that the misleading testimony could have affected the jury's verdict (slip sheet opinion at 1987-88; App. 7a-8a). In so ruling, the lower court misapplied the "reasonable likelihood" standard enunciated by this Court in *Giglio*.

The petitioner agrees with the Fifth Circuit's opinion that the police and prosecutorial conduct in this case violated the *Napue-Giglio* doctrine but rejects the conclusion that there was no reasonable likelihood that the misleading testimony might have affected the jury's judgment.

In *Napue*, the principal state witness, then serving a long sentence for the same crime, testified that he had received no promise of consideration in return for his testimony against Napue. The state prosecutor had in fact promised him consideration but did nothing to correct the testimony which he knew to be false. This Court held that it was not bound by the state court's finding that the false testimony "could not in any reasonable likelihood have affected the jury's judgment," and it reversed Napue's conviction on due process grounds because its own evaluation of the record revealed that the false testimony "may have had an effect on the outcome of the trial." 360 U.S. at 271-272.

Several years later, in *Giglio*, this Court was confronted with a situation where the government's key witness, an unindicted co-conspirator, testified falsely that he had received no promises that he would not be prosecuted if he cooperated with the government. The federal prosecutor was unaware that this testimony was false because he had been assured by another prosecutor that no promises had been made to this witness. Giglio's motion for a new trial was denied by the trial court, but this Court reversed saying:

> *** We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . ." A finding of materiality of the evidence is required ***. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." *Napue, supra* at 271. 405 U.S. at 154.

The situation presented here is much more grievous than either *Napue* or *Giglio*. The key government witness did not candidly respond to defense counsel's cross-examination as to whether he had been promised any consideration for his testimony. Two members of the DEA task force continued this deception by denying that they had made any "overtures" or "deals" with this witness when in truth he had been offered benefits in return for his cooperation. The prosecutor, who testified at the motion for new trial hearing, had no explanation for not correcting this misleading testimony.

The petitioner submits that this deliberate police and prosecutorial deception and misconduct is a greater violation of the right to due process than that found by this Court in *Napue* and *Giglio*. This Court must therefore grant certiorari because the Fifth Circuit's decision conflicts with the principles announced in *Giglio* and *Napue*.

In *United States v. Butler*, 567 F.2d 885 (9 Cir. 1978), the trial court, after an evidentiary hearing on the defendant's motion for new trial, found that the government attorney and the government agents gave more assurances to their key witness than they or the witness had been willing to admit during the trial testimony. However, the trial court denied the new trial motion because the court concluded that this nondisclosure was not reasonably likely to have affected the jury's verdict. The Ninth Circuit held that the trial court misapplied this Court's "reasonable likelihood" standard, and it said:

> The proper standard in negligent nondisclosure cases should call for a new trial whenever the nondisclosed evidence might reasonably have affected the jury's judgment on some material point, with-

> out necessarily requiring a supplementary finding that it also would have changed its verdict. *Giglio's* "effect on the judgment of the jury" language seems to focus on the quality of the evidence rather than on the outcome of the case.
>
> * * *
>
> Applying the standard we hold applicable *** disclosure of the exact nature of the prosecution's dealings with its key witness would certainly have affected the weight given his testimony by the jury. 567 F.2d at 890-891.

Here, full disclosure of the exact nature of the government's dealings with its key witness would certainly have affected the weight given his testimony by petitioner's jury. Thus, this Court must grant certiorari because the Fifth Circuit's decision directly conflicts with the holding of the Ninth Circuit in *United States v. Butler.*

This Court also has the authority to establish standards for the administration of justice in the federal courts on non-constitutional grounds. *United States v. Hale,* 422 U.S. 171 (1975); *McNabb v. United States,* 318 U.S. 332 (1943). In *McNabb,* Mr. Justice Frankfurter wrote:

> [T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due

> process of law" and below which we reach what is really trial by force. 318 U.S. at 340.

The deliberate use of misleading testimony relevant to the credibility of the government's key witness here must not be sanctioned by this Court regardless of whether minimal due process standards have been met.

Consequently, this Court must grant certiorari and reverse the petitioner's convictions so as to announce the prophylactic rule that deliberate misleading testimony by government agents reflecting on the credibility of the prosecution's key witness will not be condoned.

CONCLUSION

In view of the vital importance of the questions presented and the consideration set forth above, this Court must grant this petition for writ of certiorari.

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellee,

v.

Bronzie L. CARTER, Defendant-Appellant.

Nos. 76-2325 and 77-5144.

United States Court of Appeals, Fifth Circuit.

Feb. 3, 1978.

Defendant was convicted before the United States District Court for the Middle District of Florida, John A. Reed, Jr., J., of unlawfully distributing heroin and of conspiring to distribute heroin, and he appealed. The Court of Appeals, Hill, Circuit Judge, held that: (1) repeal of the "no-knock" law did not indicate congressional intent to eliminate common-law exceptions to statute authorizing forced entry to execute a search warrant where an officer is refused admittance after notice of authority and purpose; (2) drug agent's failure to comply with terms of such statute was justified by exigencies of the situation; (3) although drug agents did not candidly respond to defense counsel's questions as to whether any promises had been made to secure testimony of one conspirator against defendant reversal was not required since it could not be concluded that more candid disclosure would likely have affected the verdict and (4) failure to give limiting instruction concerning use of hearsay testimony of coconspirators was not plain error.

Affirmed.

Skelton, Senior Judge, concurred specially and filed opinion.

1. Searches and Seizures ⇐3.8(1)

Repeal of "no-knock" law, which authorized a federal agent in certain situations to execute a search warrant for narcotics without announcing his authority or purpose, was not indicative of legislative intent to eliminate the common-law exceptions to statute providing that an officer may break open a door of a house to execute a search warrant if after notice of authority and purpose he is refused admittance. 18 U.S.C.A. § 3109; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 509(b), 21 U.S.C.A. § 879(b).

2. Searches and Seizures ⇐3.8(1)

Although the common law exhibits a deep respect for the individual's right to privacy in his home, the common law also permits certain intrusions on such right. 18 U.S.C.A. § 3109.

3. Drugs and Narcotics ⇐189

Exigent circumstances justified drug agent's failure to comply with statute authorizing forced entry to execute a search warrant if the officer is denied admittance after notice of authority and purpose where an individual jumped off trailer doorstep when he saw officers approach, when agent, who yelled "Sheriff's Department with a warrant," reached trailer door, which was slightly ajar, he heard someone inside yell, "It's the cops," and heard people running from the door and again announced that he had a warrant and agent was concerned about possible destruction of evidence, namely heroin. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; 18 U.S.C.A. § 3109.

4. Searches and Seizures ⇐3.8(1)

In determining lawfulness of an entry and existence of probable cause, a

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court concerns itself only with what the officers had reason to believe at time of their entry. 18 U.S.C.A. § 3109.

5. Criminal Law ⇐913(1)

Although government agents did not candidly respond to defense counsel's questions as to whether agents had promised prosecution witness anything in exchange for his testimony against defendant, new trial was not required since there was no reasonable likelihood that agents' failure to reveal that they had attempted to induce witness to testify against defendant affected the jury's judgment in that witness himself apprised the jury that he expected to benefit by testifying and that the agents had suggested to him that it would be in his best interests to do so and there was otherwise sufficient evidence of guilt. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.C.A.Const. Amend. 5.

6. Constitutional Law ⇐268(1)

Due process clause of the Fifth Amendment mandates that each defendant receive a fair trial; although the Government has an obligation to prosecute cases zealously, the Government's primary obligation is to try each case fairly and with due regard for the accused's rights. U.S.C.A.Const. Amend. 5.

7. Criminal Law ⇐1038.2

Where defense counsel raised hearsay objection to government agents' testimony concerning out-of-court conversations they had with prosecution witness but did not request a limiting instruction, failure to sua sponte instruct that out-of-court statements of a coconspirator are inadmissible against a defendant until a conspiracy is established by nonhearsay evidence would warrant reversal only if it constituted plain error affecting substantial rights. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

8. Criminal Law ⇐1038.2

Failure to give cautionary instruction that out-of-court statements by coconspirators are inadmissible against defendant until the conspiracy is established by nonhearsay evidence was not plain error where coconspirator testified that she would call defendant for heroin, that heroin would then be left at her trailer and that another would pick up the heroin and pay the witness, at which time she would call the defendant, who would then come to her trailer to pick up the money. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

9. Criminal Law ⇐763(1)

Trial court's instructing jury, when reading one count of the indictment, that he would not read overt acts one through ten because there was no evidence to support them did not constitute error, much less plain error, on theory that such statement implied that there was evidence to support the other overt acts alleged in such count. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

10. Criminal Law ⇐641.13(1)

In determining whether defendant has been afforded effective assistance of counsel, the applicable standard is that of reasonably effective assistance; such standard does not require errorless counsel.

11. Criminal Law ⇐641.13(2)

Failure of counsel to request limiting instructions on use of a coconspirator's out-of-court statements was insufficient to establish charge of ineffective assistance where, among other things, counsel filed pretrial motions to dismiss,

to suppress and for a bill of particulars and cross-examined coconspirators and elicited information concerning their possible bias in favor of the Government and made several objections to use of hearsay testimony.

Appeals from the United States District Court for the Middle District of Florida.

Before THORNBERRY, Circuit Judge, SKELTON, Senior Judge * and HILL, Circuit Judge.

HILL, Circuit Judge:

After a jury trial, defendant Bronzie Carter was convicted of unlawfully distributing heroin in violation of 21 U.S.C. § 841(a)(1) and of conspiring to distribute heroin in violation of 21 U.S.C. § 846. By order of this Court, the defendant's direct appeal from his convictions has been consolidated on this appeal with the defendant's appeal from the district court's denial of his motion for a new trial. The defendant challenges his convictions on several grounds. We hold that the defendant's allegations of error are meritless, and we affirm.

During the summer and fall of 1975, Agents Goode and Kelsey of the Orlando, Florida, Police Department, working as an undercover team, investigated a three-tier heroin distribution chain. Defendant Carter sold heroin to Terri Ovitt, who then sold the heroin to Anthony Italiano. Goode and Kelsey developed evidence against the defendant and Italiano by making several purchases of heroin from Italiano. Italiano was arrested on the night of October 29, 1975, by agents of the United States Drug Enforcement Agency (DEA). On the same night, DEA agents and local law enforcement officers executed a search warrant at defendant Carter's home and arrested him. During the hearing on the motion to suppress, the parties disputed several important facts concerning the execution of the search warrant. We state and apply the law to the facts as they were found by the district court after the suppression hearing because the district court's findings of fact are supported by the record. *United States v. Johnson*, 327 U.S. 106, 111–12, 66 S.Ct. 464, 90 L.Ed. 562 (1946).

Approximately 16 law enforcement officers executed the search warrant for heroin at the defendant's trailer home. DEA Agent Porter was the first officer to enter the trailer. As he and another officer drove to the trailer, they saw a man standing at the trailer door. The man jumped off the doorstep and ran away from the trailer when he saw the officers approach. Porter then ran toward the trailer and yelled, "Sheriff's Department with a warrant," when he was approximately 15 feet from the trailer. When Porter reached the trailer door, it was slightly ajar. Porter heard someone inside the trailer yell, "It's the cops," and he heard people inside the trailer running away from the door. Porter again announced that he had a warrant from the Sheriff's Department, and he entered the trailer. Porter immediately proceeded to the trailer bathroom, where he found the defendant and another person emptying the contents of a clear plastic bag into the toilet. Porter arrested the defendant. After placing the other trailer occupants under control, Porter and some other officers completed their search of the trailer. Among the items they seized were a triple-beam balance, some glass jars con-

* Senior Judge of the United States Court of Claims, sitting by designation.

taining lactose, and boxes of tinfoil. The officers also seized traces of heroin that were on the toilet and in the plastic bag the defendant had been emptying into the toilet.

[1–4] The defendant argues that Agent Porter's entry into the trailer violated 18 U.S.C. § 3109, which provides that an officer may break open a door of a house to execute a search warrant if "after notice of his authority and purpose, he is refused admittance . . ." because Porter did not give the trailer occupants an opportunity either to open the door or to refuse admittance. The defendant further argues that § 3109 does not have an exigent circumstances exception and that, even if it does, Porter was not confronted with a situation justifying his failure to comply with the statute.

Although the Supreme Court has never expressly held that § 3109 has an exigent circumstances exception, the Court has strongly indicated that it would recognize such an exception on the appropriate fact situation:

> Exceptions to any possible constitutional rule relating to announcement and entry have been recognized . . . and there is little reason why those limited exceptions might not also apply to § 3109, since they existed at common law, of which the statute is a codification.
>
> *Sabbath v. United States*, 391 U.S. 585, 591, 88 S.Ct. 1755, 1759, 20 L.Ed.2d 828 n. 8 (1968).

See also Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). This Court explicitly has held that compliance with § 3109 may be excused when exigent circumstances exist. *United States v. Chapman*, 384 F.Supp. 1232, 1236 (S.D.Fla.1974), *aff'd*, 523 F.2d 1054 (5th Cir. 1975); *United States v. Squella-Avendano*, 447 F.2d 575, 584 (5th Cir.), *cert. denied*, 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed.2d 369 (1971); *United States v. Garcia Mendez*, 437 F.2d 85, 86 (5th Cir. 1971).

The defendant argues, however, that this Court should no longer recognize an exigent circumstances exception to § 3109 because Congress repealed the "no-knock" law, 21 U.S.C. § 879(b), which authorized a federal agent in certain situations to execute a search warrant for narcotics without announcing his authority or purpose, and because neither Congress nor the Supreme Court has since engrafted an exigent circumstances exception onto § 3109. We reject this argument. Although the common law exhibits a deep respect for the individual's right to privacy in his home, the common law also permits certain intrusions upon this right. The legislative history accompanying the repeal of the "no-knock" law shows that Congress did not intend that repeal of the law eliminate the common law exceptions to § 3109. In addition to repealing the "no-knock" law, Congress made § 3109 applicable in the District of Columbia. The legislative history states:

> It is the conferees' intent that D.C. police be required to announce their authority and purpose in the same situations in which other Federal law enforcement officers are required to make such announcement. Conversely, they should be excused from compliance with the rule in those situations where other Federal law enforcement officers are excused.
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> • • • • • •
>
> [T]he conferees were concerned that retention of the [statutory] exception relating to entry by trick or stratagem could lead courts to conclude that no

other exceptions are available in the District of Columbia. This was not the conferees' intent. Conf.Rep. No. 1442, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5974, 5977–78.

Therefore, this Court still recognizes an exigent circumstances exception to § 3109 despite repeal of the "no-knock" law.

We affirm the district court's holding that Agent Porter's failure to comply with the terms of § 3109 was justified by the exigencies of the situation. In determining the lawfulness of an entry and of the existence of probable cause, a court concerns itself only with what the officers had reason to believe at the time of their entry. *Ker v. California*, 374 U.S. 23, 40–41 n. 12, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). In the case on appeal, Agent Porter had reason to believe that the person who ran from the trailer had detected the officers' presence. When Porter reached the trailer, he heard someone inside the trailer announce the officers' presence and the sound of people running away from the door where he stood. These facts justified Porter in being "virtually certain" that the persons inside the trailer knew Porter's purpose and that making the statutorily prescribed announcement of authority and purpose would be a "useless gesture." *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958); *United States v. Chapman*, 384 F.Supp. 1232 (S.D.Fla.1974), *aff'd*, 523 F.2d 1054 (5th Cir. 1975); *United States v. Squella-Avendano*, 447 F.2d 575 (5th Cir.), *cert. denied*, 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed.22d 369 (1971). Finally, Agent Porter was concerned about the possible destruction of evidence; heroin is a readily disposable item. Therefore, the execution of the search warrant was legal.

[5, 6] The defendant's appeal from the denial of his motion for new trial raises a troublesome issue. The defendant alleges that his constitutional rights to due process and to a fair trial were violated by the Government's alleged failure to reveal material impeachment evidence exclusively in its possession and by the Government's failure to correct allegedly false testimony by Italiano, Agent Goode, and Agent Kelsey. The parties sharply dispute the facts that form the basis for the defendant's argument. Therefore, this Court accepts the facts as found by the district court, because the district court's findings were not "wholly unsupported by [the] evidence." *United States v. Johnson*, 327 U.S. 106, 111, 66 S.Ct. 464, 90 L.Ed. 562 (1946).

Anthony Italiano, the person who sold heroin to Agents Goode and Kelsey of the Orlando, Florida, Police Department, testified as a prosecution witness at trial. Italiano was arrested the same night the defendant was arrested. After Italiano's arrest, John LePore, supervisor for the Orlando DEA unit, advised Italiano that he was charged with seven counts of dispensing heroin and that each violation had a maximum penalty of 15 years. LePore also told Italiano that if he would cooperate with the DEA, including testifying concerning his heroin source, Italiano's cooperation would be reported to the United States Attorney. Italiano subsequently entered into a plea agreement, by which he agreed to provide the Government with information concerning his heroin source. In December 1975, however, Italiano renounced the plea agreement. Assistant United States Attorney Thomas Mihok then told Italiano that Mihok would urge the trial court to impose the maximum sentence

of incarceration if Italiano was convicted. Subsequent to the collapse of the plea agreement, Italiano was convicted on all seven counts against him.

During debriefings under the aborted plea agreement, Agent Kelsey had told Italiano that he would advise the trial court and the United States Attorney of Italiano's cooperation if Italiano would testify at the Carter trial. Three days before the Carter trial, Agent Goode promised Italiano that Goode would inform Italiano's sentencing judge of Italiano's cooperation. The district court found that affirmative promises were not made to Italiano concerning protection for his family and for himself until after the conclusion of Italiano's testimony in the Carter case. The court also found that, after Italiano's arrest on October 29, 1975, he worked as a confidential informant for Goode to provide him with information on matters unrelated to the Carter case.

During the Carter trial, the defense counsel asked Italiano whether he had ever been offered anything in return for his testimony. Italiano responded that he had not. In response to further questioning by the defense counsel, however, Italiano testified that he had been convicted of selling heroin to Agents Goode and Kelsey and that he thought "it might go lighter on [him]" if he testified against Carter. Italiano further testified that neither Goode nor Kelsey promised him anything for testifying against Carter but that they had suggested to him that they would "help [him] out" if he did so. Agent Goode testified on cross-examination that he had never approached Italiano about a possible deal in exchange for his testimony and that Goode had never been with Kelsey when Kelsey had done so. Agent Kelsey testified on cross-examination that he had never made any "overtures" to Italiano about what Kelsey might be able to do for him if he testified against Carter.

After Carter's trial, Italiano gave a sworn statement to Carter's attorney in which he asserted that he had testified against Carter because he had been coerced and threatened by the Government's counsel and by DEA agents and because he had been offered inducements and lenient treatment in return for his testimony. Carter's attorney then filed a motion for new trial in the district court. After the hearing on the motion, the district court found that the only promises Italiano had received before trial were that Agent Goode would advise Italiano's sentencing judge of Italiano's cooperation and that DEA Supervisor LePore would notify the Assistant United States Attorney of Italiano's cooperation. The district court denied the defendant's motion for new trial, holding that there was no reasonable likelihood that the jury verdict would have been affected by disclosure of the information that was the subject of the motion.

Examination of the entire line of Italiano's cross-examination concerning his possible bias shows that Italiano apprised the jury that he expected to benefit by testifying against Carter. The Government argues that Goode's and Kelsey's testimonies also were truthful. The Government argues that Goode's testimony was truthful because Italiano allegedly approached Goode, whereas the defense counsel only asked whether Goode had ever approached Italiano. Additionally, the Government argues that Goode's promise to Italiano was not offered in exchange for Italiano's testimony because Goode made this promise after Italiano already had agreed to testify and because Goode would have been morally obliged to inform Italiano's sen-

tencing judge about Italiano's informant work regardless of whether Italiano testified voluntarily at the Carter trial. The Government argues that Kelsey's trial testimony was truthful because Kelsey testified at the hearing on the motion for new trial that he interpreted the word "overture" in the defense counsel's question to mean "undue pressure, coercion, harassment, promises, anything [he] couldn't fulfill, or deceive [Italiano] in any way."

We do not determine whether Agent Goode's and Agent Kelsey's testimonies were perjurious or nonperjurious in the strict legal definition of perjury. The Government's argument that Goode's and Kelsey's testimonies were truthful depends more upon criticism of the questions put to them than upon candor on the part of these witnesses. The Agents did not candidly respond to the defense counsel's questions, and the prosecuting attorney did nothing to correct the Agents' evasive testimonies. *See Blankenship v. Estelle*, 545 F.2d 510 (5th Cir. 1977); *Dupart v. United States*, 541 F.2d 1148 (5th Cir. 1976). Therefore, for purposes of this case, we review the Agents' testimonies in light of the stringent standard stated in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In *Giglio*, the Supreme Court held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's judgment. *See also Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Applying that standard, we affirm the district court's holding. Although Agents Goode and Kelsey did not reveal that they had attempted to induce Italiano to testify against the defendant, Italiano himself apprised the jury that he expected to benefit by testifying and that Agents Goode and Kelsey had suggested to him that it would be in his best interest to do so. There was sufficient evidence at trial establishing the defendant's guilt that this Court cannot conclude that more candid disclosure by witnesses Goode and Kelsey would have been reasonably likely to have affected the verdict. Italiano testified that he had direct dealings with the defendant in connection with the procurement of heroin. When testifying at the hearing on the defendant's motion for new trial, Italiano did not refute any of his trial testimony concerning the defendant's guilt. Italiano's trial testimony was corroborated by the testimony of Terri Ovitt, who was shown by the evidence to be the middleman through whom the defendant distributed heroin to Italiano. Furthermore, Italiano's and Ovitt's testimonies were corroborated by surveillance agents and by the search of the defendant's residence.

Finally, the testimony of the defendant's trial counsel, Ed Leinster, at the hearing on the motion for new trial shows that from the time Italiano's plea bargain collapsed until shortly before trial, Italiano kept Leinster informed about any and all "pressures" being exerted on Italiano to testify against Carter. Leinster testified that he had discussed with Italiano the plea negotiations between Italiano and the Government. Leinster also testified that he knew that Agents Goode and Kelsey were attempting to induce Italiano to testify by giving him general assurances that they would try to do something for him and by telling Italiano that they could make things easy or hard for him. During the Carter trial, Leinster examined the attorney who represented Italiano in the plea negotiations about the aborted plea bar-

gain. On cross-examination, Leinster elicited from Italiano that he expected to benefit by testifying. The jurors were made aware of any expectations on the part of Italiano which might have motivated him as a witness. We affirm the district court's denial of the motion for new trial.

Although we affirm the district court's holding, we condemn the Government's use of misleading testimony. The due process clause of the fifth amendment mandates that each defendant shall receive a fair trial. Although the Government has an obligation to prosecute cases zealously, the Government's primary obligation is to try each case fairly and with due regard for the accused's rights. The witnesses yielded to a temptation to evade; the Government's counsel ought not have done so.

[7, 8] Citing this Court's decision in *United States v. Apollo*, 476 F.2d 156 (5th Cir. 1973), the defendant next argues that the trial judge committed reversible error by failing to give a cautionary instruction to the jury that out-of-court statements made by a coconspirator are inadmissible against the defendant until the conspiracy is established by nonhearsay testimony. Specifically, the defendant objects to Agents Goode's and Kelsey's testimonies concerning out-of-court conversations they had with Italiano. Although the defense counsel objected to this testimony on the basis that it constituted hearsay, he did not request a limiting instruction either when the statements were admitted during trial or during the jury charge. Therefore, the trial court's failure to give the limiting instruction sua sponte is reversible error only if it constitutes plain error affecting substantial rights. Fed.R.Crim.P. 52(b); *United States v. Garcia*, 531 F.2d 1303, 1307 (5th Cir.), *cert. denied*, 429 U.S. 941, 97 S.Ct. 359, 50 L.Ed.2d 311 (1976); *United States v. Fendley*, 522 F.2d 181, 186 (5th Cir. 1975).

In *Apollo*, the trial court refused to give a limiting instruction though the defense counsel promptly objected to the introduction of certain hearsay testimony without a proper cautionary instruction. This Court stated that the record in *Apollo* was "replete with . . . extra-judicial statements" and that the trial court permitted "a veritable flood" of hearsay testimony. 476 F.2d at 163. Although the trial court in *Apollo* did give an appropriate instruction in its jury charge, the court stated in the jury's presence that "connection with conspiracy must of necessity be established by some hearsay in this kind of case."

This Court has held that although *Apollo* may establish that a cautionary instruction must be given if properly requested, *Apollo* does not require an instruction when one is not requested unless manifest prejudice would result otherwise. *United States v. Moore*, 505 F.2d 620, 624 (5th Cir. 1974). Therefore, whether the holding in *Apollo* requires reversal in a particular case depends on the facts in that case. *United States v. Jennings*, 527 F.2d 862, 868 (5th Cir. 1976). During the trial of the case on appeal, the trial court specifically found that there was sufficient evidence that a conspiracy existed between the defendant and Italiano as of September 26, 1975. Therefore, the trial judge sustained the defendant's hearsay objections as to out-of-court statements made by Italiano before that date but permitted testimony concerning Italiano's out-of-court statements after that date.

We find that the existence of a heroin distribution conspiracy involving the defendant was established by nonhearsay

evidence. Coconspirator Ovitt testified, for example, that she would call the defendant for heroin and that the heroin then would be left at her trailer. Italiano then would pick up the heroin and pay her, at which time she would call the defendant. The defendant then would come to Ovitt's trailer to pick up the money. Therefore, the trial court did not commit plain error by failing to give a limiting instruction concerning the hearsay testimony.

[9] The defendant's remaining objections may be disposed of with little discussion. When the trial judge read count two of the indictment to the jury, he instructed them that he would not read overt acts one through ten because there was no evidence to support them. The defendant alleges that the trial court thereby committed a reversible error because it implied that there was evidence to support the other overt acts alleged in count two of the indictment. Because the defendant did not object to this instruction at trial, this Court will reverse the district court on the basis of this objection only if it constituted plain error affecting substantial rights. Fed. R.Crim.P. 52(b); *United States v. Garcia*, 531 F.2d 1303, 1307 (5th Cir.), *cert. denied*, 429 U.S. 941, 97 S.Ct. 359, 50 L.Ed.2d 311 (1976); *United States v. Fendley*, 522 F.2d 181, 186 (5th Cir. 1975). The Supreme Court and this Court have held that withdrawing from the jury's consideration a part of the indictment unsupported by the evidence is permissible. *United States v. Ballard*, 322 U.S. 78, 90–91, 64 S.Ct. 882, 88 L.Ed. 1148 (1944) (Stone, C. J., dissenting); *United States v. Musgrave*, 483 F.2d 327, 338 (5th Cir. 1973); *Overstreet v. United States*, 321 F.2d 459, 461 (5th Cir. 1963); Wright, Federal Practice and Procedure § 127 (1969). In the case on appeal, the trial judge's statement concerning overt acts one through ten did not prejudice the defendant. We hold that the trial judge's statement did not constitute error, much less plain error.

The defendant next argues that the trial court committed reversible error when it gave the jury a supplemental charge commonly known as an *Allen* charge. This allegation of error is meritless, because the trial court's charge was within the limits of *United States v. Bailey*, 468 F.2d 652 (1972), *aff'd en banc*, 480 F.2d 518 (5th Cir. 1973). *United States v. Atkins*, 528 F.2d 1352, 1359–60 (5th Cir. 1976).

[10, 11] Finally, the defendant argues that he was denied the effective assistance of counsel because his trial counsel did not request a jury instruction concerning the limited use of hearsay testimony in a conspiracy trial. In determining whether a defendant has been afforded the effective assistance of counsel, this Court applies the standard of "reasonably effective assistance." *Loftis v. Estelle*, 515 F.2d 872, 875 (5th Cir. 1975); *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974). This standard does not require errorless counsel. *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir. 1960), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). In the case on appeal, the defendant's trial counsel satisfied this Court's standard. Among other actions, he filed pretrial motions to dismiss, to suppress, and for a bill of particulars; he cross-examined coconspirators Ovitt and Italiano and elicited information concerning their possible bias in favor of the Government; and he made several objections to the use of hearsay testimony. Therefore, the mere failure of the defendant's trial counsel to request limiting instructions on the use of a coconspirator's out-of-court statements

is insufficient on the facts of the case on appeal to support a charge of ineffective assistance.

AFFIRMED.

SKELTON, Senior Judge, specially concurring:

I am concerned about the failure of the officers who made the search of defendant's house to comply with 18 U.S.C. § 3109, which authorizes an officer to break open a house when executing a search warrant only if after notice of his authority and purpose he is refused admittance.[1]

It is undisputed that the officers broke into the house by entering an unlocked door that was closed except for a space of 2 or 3 inches without knocking and without waiting any time at all to be admitted or denied admittance by the defendant or the other persons inside of the house. The trial judge found that there was no "literal compliance with 18 U.S.C. 3109," but approved the breaking in because he found that exigent circumstances justified the failure of the officers to comply with the statute.

In my opinion, it is highly doubtful whether exigent circumstances existed that excused the officers from complying with § 3109. The most that could be said would be that it is a very close question.

The record shows that before the officers broke into the house they did not have any information other than probable cause used to procure the search warrant that heroin was in the house, nor did they see any heroin inside before they entered the house. They were plainly on a fishing expedition seeking to find heroin in the house, but not knowing whether it was there.

The facts show further that defendant's house was a trailer house that was located at the end of a street and adjacent to a nursery operated by the defendant. For an automobile to reach the house, it must come over a hill a short distance down the road. On the night of the search, defendant's brother, Earl Carter, had been regulating the thermostats in the nursery and was washing his hands while outside the house and near the front door when he saw headlights of a number of automobiles coming over the hill toward the house with their motors running so fast they sounded like they were in a "drag race." When they got within 20 feet of Earl, he thought they were going to run over him, so he ran to the side of the house. He did not say anything to the occupants of the house. After the cars stopped, he did not hear the officers announce their authority or purpose. In fact, he did not knew they were police officers, as they were in unmarked cars, were not in uniform, and one or more of them had long hair.

The record shows further that fifteen to twenty officers participated in the search. They arrived at defendant's house on the night in question in four to six cars. The cars in front stopped 15 or 20 feet from the house, and the officers jumped out and hit the ground running as fast as they could toward the front door of the house. Officer Porter testified that when he was about 15 feet

1. Title 18 U.S.C. § 3109 provides:

"§ 3109. Breaking doors or windows for entry or exit.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

from the house he yelled "Sheriff's Department with a search warrant" and he repeated this statement when he reached the door of the house. When he got to the door, he did not knock nor even hesitate, but abruptly pushed the door open and entered with a pistol in his hand. He testified that before he entered the house he heard footsteps inside the house that sounded to him like someone was running down the hall of the house. He also said he heard someone inside the house yell "It's the cops."

Agent Wood testified that he jumped from his car and yelled "Federal agents, this is a search warrant," and then ran to the front door of the house where he again yelled "Federal agents, search warrant." Before entering the house, he said he heard the sound of people "running and scurrying around inside" and heard someone yell "Run, it is the cops." Although Agent Porter had entered the house just ahead of him, Wood had to open the door again as there was an automatic closing device on the door. He entered the house through the door without knocking and without waiting any time at all. In the meantime, the other officers either went inside the house behind Porter and Wood or surrounded the house, some of whom broke sliding plate glass doors with a sledge hammer. The trial judge found that the breaking of these glass door was a "needless act of destruction."

There were seven people inside the house, including the defendant, when the breaking-in occurred. Two of these persons were women. All but the defendant were in the living room listening to the television program of Johnny Carson. Five of these persons testified that none of them yelled "It's the cops" before the officers entered the house, and none of them heard the officers announce their authority or purpose before officer Porter charged into the house with a gun in his hand. After the occupants of the house were secured and forced by the officers to lay on the floor with their hands behind their backs, including the women, and with the officers' feet on their necks and guns pointed at their heads, one of the officers read the search warrant aloud. Until this was done, the people in the house did not know the intruders were police officers and thought they were robbers. As stated above, the officers were not in uniform and one or more of them had long hair.

I now consider whether the above facts show exigent circumstances that justified the breaking-in without compliance with § 3109. The statute does not provide for exceptions nor for non-compliance because of exigent circumstances. However, the courts have recognized that exigent circumstances may excuse non-compliance. The officers were, of course, aware that heroin can be easily and quickly disposed of, but this alone is not a sufficient reason for their failure to comply with § 3109.

Before the cars stopped about 15 or 20 feet from the house and before the officers jumped from the cars and announced their authority and purpose, they saw Earl Carter run from the front of the house around to the back. They did not hear him say anything and he denied that he did so. His running from the front of the house was explained by him as an act to keep from being run over by the cars of the officers. In any event, his running around the house before the officers jumped from their cars and announced their authority and purpose was an ambiguous act and was not an exigent circumstance. See *Miller v. United States*, 357 U.S. 301, 311, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958).

A critical issue on exigent circumstances is whether officers Porter and Wood heard footsteps or the sound of a person or persons running in the hall of the house *before* they broke into the house. This is especially true as to officer Porter who was the first one to break into the house. Human experience would indicate that under the facts it is highly doubtful that the officers heard any footsteps in the hall of the house before they entered. As pointed out above, Porter and Wood were in the lead cars. It is obvious that when they jumped from their cars the other cars were approaching with their motors running at high speeds and making a lot of noise. Both officers ran as fast as they could the 15 or 20 feet to the house, which was logically no more than four or five steps for a running man who is trying to cover the distance in a hurry. While they ran, each of them yelled their authority and purpose twice, or four times by both of them, between the time they left the cars and reached the front door. Also, the other officers were leaving their cars and running with Porter and Wood to the house with the attendant noise of their own footsteps. Furthermore, the TV set was showing the Johnny Carson show in the living room into which the front door opens, with the usual noise of a TV set. To believe, with the noise of the cars, the noise of the footsteps of Porter and Wood, the noise of the footsteps of the other officers, the noise of Porter and Wood yelling their authority and purpose four times while taking four or five steps, plus the noise of the TV set inside the house opposite the front door, that officers Porter and Wood heard footsteps running down the hall of the trailer house, *before* they broke into the front door without knocking and while running at full speed, puts a severe strain on one's credulity. However, the trial judge found that Porter did hear the footsteps and running down the hall when he arrived at the door. While we are bound by his finding, there is a serious question, in my opinion, whether this finding is supported by substantial evidence.

The occupants of the house denied that anyone ran down the hall *before* officer Porter entered the house. They testified that *after* he burst through the front door with gun in hand, they were scared and thought he was a robber and two of them, including defendant's pregnant wife, ran to the back of the trailer. Their running at this point in time could not constitute an exigent circumstance that would excuse compliance with § 3109, because it occurred after, and not before the breaking-in by officer Porter.

Officer Porter testified that he had participated in "a few hundred searches," and that he knew the requirements of entering a house unannounced. This testimony shows that he knew that if he heard noises that he could conclude were footsteps or running before he entered the house, he could contend that exigent circumstances existed that would excuse compliance with § 3109. With this background, it is no surprise that his hearing was so acute that he could hear footsteps and running inside the house above the din, commotion, and noises described above, before he broke into the house while running at full speed. Such testimony appears, at least to me, to be incredible.

If it could be assumed under the facts existing at the time and place in question that it was impossible for officer Porter to have heard a noise before the break-in that sounded to him like people running down the hall of the trailer, the

only other exigent circumstance was Porter's statement that when he arrived at the door he heard someone inside yelling "It's the cops." The occupants of the house denied that anyone made such a statement, but the trial judge found otherwise. An analysis of the cases and of the statute reveals that there are two prongs to the announcement that officers must make before breaking into a house, namely, (1) that they are police officers, and (2) their purpose in being there. Both requirements of the statute must be met and compliance with only one will not suffice. The Supreme Court stated in *Miller v. United States, supra*:

> "The requirement of prior notice of authority *and* purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. . . . The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority *and* purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed." (357 U.S. 313–314, 78 S.Ct. 1198). (Emphasis supplied.)

Also, see *Sabbath v. United States*, 391 U.S. 585, 589, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968) where the court quoted the above statement with approval, and stated further:

> ". . . [T] his record does not reveal any substantial basis for excusing the failure of the agents here to announce their authority *and* purpose." (391 U.S. 591, 88 S.Ct. 1759). (Emphasis supplied.)

It is argued that since someone inside the house yelled "It's the cops," the occupants of the house knew the authority and purpose of the officers and that it would have been a "useless gesture" for the officers to make the announcement as to their authority and purpose. This may be true as to the *authority* of the officers, but not so as to their *purpose*. There is nothing in the record to show that the occupants of the house knew the purpose of the officers in being at the house prior to the breaking-in, nor is there any evidence that justified officer Porter in being "virtually certain" they had this knowledge.

The leading case with regard to the "useless gesture" exception is *Miller v. United States*, supra. In *Miller*, Justice Brennan stated:

> "It may be that, without an express announcement of *purpose*, the facts known to officers would justify them in being *virtually certain* that the petitioner already knows their *purpose* so that an announcement would be a useless gesture." (357 U.S. 309, 78 S.Ct. 1196) (Emphasis supplied.)

This Court, in *United States v. Chapman*, 523 F.2d 1054 (5 Cir. 1975), affirmed a district court opinion, *United States v. Chapman*, 384 F.Supp. 1232 (1974), which held:

> "Next, the government argues that making the statutorily-prescribed announcements of authority *and* purpose would have been a 'useless gesture.' *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). To take advantage of this exception, however, the government must show that 'the facts known to the officers would justify them in being *virtually certain* that the petitioner already knows their *purpose* . . . .' Id. at 310, 78 S.Ct. at 1196." (384 F.Supp. 1236) (Emphasis supplied).

Furthermore, this Court stated in *United States v. Squella-Avendano*, 447 F.2d 575 (5 Cir. 1971),

> "According to *Miller v. United States*, to justify the breaking it must appear either that the agents did in fact announce their *purpose* or that facts known to them before the breaking 'would justify them in being *virtually certain* that [the occupants] already [knew] their *purpose* so that an announcement would [have been] a useless gesture.'" (447 F.2d 584) (Emphasis supplied) (Brackets in text).

In the instant case, instead of officer Porter being justified by the facts in being "virtually certain" that the occupants already knew his purpose so that an announcement would have been a useless gesture, it appears, at least to me, that when he broke through the door running at full speed and without hesitating, it was virtually impossible for him to be certain that the occupants knew his purpose even if they knew his authority.

Finally, Officer Porter's concern about the possible destruction of heroin which he suspected was in the house, was not enough to constitute an exigent circumstance, without more, that would justify his breaking into the house without complying with § 3109.

I feel that some comment should be made about the acts and conduct of the officers after they broke into the house. The record shows that they forced the occupants of the house to lay face down on the living room floor with their hands behind their backs. The officers then placed their feet on the necks of the occupants, including the neck of one woman, all the while cursing them and abusing them with vulgar and obscene language and threatening to blow their heads off with pistols, rifles, and shotguns pointed at them. The plate glass sliding doors were then broken with a sledge hammer by some of the officers, shattering glass on top of the people on the floor and also overturning a stereo player, bookshelves, and a reel-to-reel set on top of them. The officers then forced the occupants to go outside the house and kneel on the ground. They were then handcuffed with their hands behind their backs. The occupants were not armed and at no time offered any resistance. None of them, except the defendant, were ever charged, indicted, or tried for any wrongdoing whatever, nor were they shown to have been connected in any way with the illicit drug traffic. In the meantime, the officers tore away part of the trailer, ripped out the commode and dug up a section of sewer pipe, which they carried away.

This conduct was an arrogant and flagrant abuse of their authority. Their acts were reprehensible and should be condemned. No citizen of this country who has committed no crime and offers no resistance should be subjected to the abuse and treatment the occupants of the house received at the hands of these officers. Such conduct breeds contempt and disrespect for the law and hatred for law enforcement officers. I could not let this part of the case go unnoticed without expressing my strong disapproval of these acts of the officers that were never denied nor disputed by them, and on which the court made no findings. While the conduct of the officers after the breaking-in shed no light on the issue of exigent circumstances existing before the breaking-in, nevertheless, it should have had an effect on the trial judge as to their credibility on that issue.

In my opinion, there is only slight evidence of doubtful character in the record

that supports the finding of the trial judge that exigent circumstances existed prior to the breaking-in of defendant's house by officer Porter which excused his compliance with § 3109. Nevertheless, he made such finding and I am bound by it. For that reason alone, I reluctantly concur with the opinion of the court on that phase of the case. I find no fault with the remainder of the court's opinion and agree with it.

Our opinion as to the breaking in of defendant's house by officer Porter, without compliance with § 3109, should be regarded as being limited to the very narrow finding of exigent circumstances by the trial judge, and my concurrence on that issue is certainly so limited. I agree with the following statement of Judge Burger (now the Chief Justice) in *Masiello v. United States*, 115 U.S.App. D.C. 57, 317 F.2d 121, 123 (1963), which was a case very similar to the instant case in many respects:

> "It would be a grave error to construe what we have said to mean that we are disposed to sustain all speedy entries and searches which are forcibly executed. Quite the contrary. We do so here only on the narrow grounds revealed by this record. Our concern with the importance of compliance with § 3109 is demonstrated by our earlier remand[5] for the hearing now under review; close cases such as this will always receive careful appellate scrutiny."
>
> "[5] It would not seem too much to expect that officers engaged in executing a search warrant take some note of the time when notice is given and the time when a break-in occurs. This can easily be done with an ordinary watch."

Accordingly, our opinion should not be understood as carte blanche authority for police officers to break into a private residence without complying with § 3109 every time they suspect that illegal drugs may be found in the house and which they fear may be destroyed unless they make a speedy entry. Non-compliance cases such as this will always be carefully scrutinized by this court.

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No. 77-1326

In the Supreme Court of the United States

OCTOBER TERM, 1977

BRONZIE L. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 566 F. 2d 1265.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1978. Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 20, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a warrant-authorized entry into petitioner's house-trailer violated 18 U.S.C. 3109.

2. Whether the trial court erred by giving an *Allen* charge after the jury announced that it was deadlocked.

3. Whether, in the circumstances of this case, petitioner is entitled to a new trial because government agents did not testify candidly concerning their relationship to a government witness.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of one count of distribution of a controlled substance (heroin), in violation of 21 U.S.C. 841(a)(1), and one count of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of 10 years' imprisonment, to be followed by consecutive special parole terms of three years each. The court of appeals affirmed (Pet. App. 1a-15a).

The government's evidence showed that during the summer and fall of 1975, agents from the Drug Enforcement Agency (DEA) and officers from the Orlando, Florida, Police Department were investigating a heroin distribution chain in which petitioner supplied drugs to Terri Ovitt, who in turn sold them to Anthony Italiano (Pet. App. 3a).[1]

At approximately 11:40 p.m. on October 29, 1975, 16 officers from the DEA and the local police went to petitioner's house-trailer to execute a search warrant for heroin (Pet. App. 3a). As he drove toward the trailer, DEA Agent Porter observed a man come out of the

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[1]Italiano was tried and convicted on seven counts of distribution of heroin (Pet. App. 5a-6a). Ovitt was granted immunity from prosecution (Tr. 113-117) and testified at petitioner's trial.

trailer door and run away from the approaching officers (Pet. App. 3a; H. Tr. 101-102).[2] Porter stopped his car 15 or 20 feet from the trailer (H. Tr. 102) and then ran from the car to the trailer shouting "Sheriff's Department with a search warrant" (H. Tr. 102). As he reached the trailer door (which was partially open), he again shouted "Sheriff's Department with a search warrant" (H. Tr. 123, 103, 108). Porter testified that he heard someone inside yell, "It's the cops," and the sound of people running away from the door (H. Tr. 123, 103; Pet. App. 3a). Porter then entered the trailer and proceeded down the hallway towards a bathroom where he heard the sound of a toilet being flushed (H. Tr. 104). He opened the bathroom door and observed petitioner and another person by the toilet. He noticed a clear plastic bag fall to the floor in front of the toilet (H. Tr. 104-105; Pet. App. 3a). Traces of heroin were found on the seat of the toilet and in the water of the toilet (Tr. 328-330, 385-386, 397-398; Pet. App. 3a-4a).

The agents then searched the trailer pursuant to the warrant and seized narcotics and assorted narcotics paraphernalia (Pet. App. 3a-4a).

Petitioner filed a motion to suppress the evidence seized during the agents' search, alleging that Porter violated the provisions of 18 U.S.C. 3109 by failing to announce his authority and purpose and to await admittance before entering the trailer. The district court denied the motion, and the evidence was admitted at petitioner's trial (see Pet. App. 5a).

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[2]"H. Tr." refers to the transcript of the hearing on petitioner's motions to suppress certain evidence and to dismiss the indictment against him.

ARGUMENT

1. Petitioner contends (Pet. 12-15) that Agent Porter's entry into his trailer to execute the search warrant violated 18 U.S.C. 3109, which provides that an "officer may break open any * * * door or window of a house * * * to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance." Although Agent Porter announced his identity and purpose as he ran toward the trailer, and again as he reached the doorway, he entered the partially open door without waiting to see if he would be refused admittance. The court of appeals affirmed the district court's conclusion that any departure from Section 3109 was justified by the exigent circumstances (Pet. App. 5a).

We note at the outset that Section 3109, which concerns breakings, does not apply in this case at all. The record shows that the door to the trailer was *ajar* when Porter reached it (Pet. App. 3a). Accordingly, his entry was not a "breaking" of any kind. See, *e.g.*, *United States* v. *Morell*, 524 F. 2d 550, 556 (C.A. 2); *United States* v. *Lopez*, 475 F. 2d 537, 540-541 (C.A. 7); *United States* v. *Johns*, 466 F. 2d 1364 (C.A. 5); *United States* v. *Syler*, 430 F. 2d 68, 70 (C.A. 7); *Vanella* v. *United States*, 371 F. 2d 50, 58 (C.A. 9), certiorari denied, 386 U.S. 920; *United States* v. *Conti*, 361 F. 2d 153 (C.A. 2), vacated on other grounds, 390 U.S. 204; *United States* v. *Williams*, 351 F. 2d 475 (C.A. 6); *United States* v. *Hassell*, 336 F. 2d 684 (C.A. 6), certiorari denied, 380 U.S. 965.[3] Cf. *United*

[3]The District of Columbia Circuit, alone among federal courts, has held that officers must announce their authority and purpose before entering through an open door. *Hair* v. *United States*, 289 F. 2d 894. This case has been explicitly rejected by other courts of appeals. See *Ng Pui Yu* v. *United States*, 352 F. 2d 626 (C.A. 9); *Vanella* v. *United States, supra*, 371 F. 2d at 58 n. 2. It also appears to be inconsistent with the language of 18 U.S.C. 3109 and unsupported by any rationale for such a rule.

States v. *Bradley*, 455 F. 2d 1181, 1185-1186 (C.A. 1), affirmed, 410 U.S. 605. Other cases are collected in Annotation, *What Constitutes Violation of 18 U.S.C. § 3109 Requiring Federal Officer to Give Notice of His Authority and Purpose Prior to Breaking Open Door or Window or Other Part of House to Execute Search Warrant*, 21 A.L.R. Fed. 820, 881-884 (1974). These cases are consistent with the language of Section 3109, which conditions the power of an officer to "break open any outer or inner door or window of a house" in order to make an authorized search or arrest. *Sabbath* v. *United States*, 391 U.S. 585, held that the unannounced opening of a closed door was a "breaking" of that door, but here there was no "breaking," since the door was not closed when the agents arrived.

Apart from this point, and contrary to petitioner's argument (Pet. 14-15), the court below did not render Section 3109 a nullity by the announcement of a novel or sweeping exigent circumstances exception. Numerous court of appeals decisions have explicitly recognized that exigent circumstances excuse failure to comply with Section 3109. *E.g.*, *United States* v. *Smith*, 520 F. 2d 74, affirmed after remand, 524 F. 2d 1287 (C.A.D.C.); *United States* v. *Garcia Mendez*, 437 F. 2d 85 (C.A. 5); *United States* v. *Bustamante-Gamez*, 488 F. 2d 4 (C.A. 9), certiorari denied, 416 U.S. 970. See generally Annotation, *supra*, 21 A.L.R. Fed. at 852-860 and cases cited. Moreover, although this Court has not had occasion to rule on the applicability of the exigent circumstances exception to Section 3109, it has noted that "there is little reason" why limited exceptions, including exigent circumstances, would not apply to Section 3109, since they were recognized by the common law, which Section 3109 was intended to codify. *Sabbath* v. *United States*, *supra*, 391 U.S. at 591 n. 8.

The court of appeals' application of the exigent circumstances exception to the facts of this case was proper, and the issue does not warrant further review by this Court.[4] The court noted that Porter, who saw one person leave the trailer and run away, and who heard sounds of running inside the trailer, had reason to believe that the officers' approach had been observed (Pet. App. 5a). Moreover, since he had shouted out his identity and purpose and then heard someone inside the trailer announce it was the "cops," he was justified in being " 'virtually certain' " that the persons inside the trailer knew his purpose (*ibid.*). Finally, since Porter was searching for heroin, a readily disposable item, he was properly concerned that any evidence in the trailer might be quickly destroyed (*ibid.*).

2. After approximately five hours of deliberation, the jury sent a note to the court stating it was unable to reach a verdict (Tr. 510). The jury continued to deliberate for another hour before it was excused for the evening (Tr. 523). At 9:30 a.m. the next morning, after overruling petitioners' objection, the district court delivered an *Allen* charge (Tr. 520-522, 527-530).[5] The jury returned a

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[4]Judge Skelton, concurring specially, stated (Pet. App. 12a) that he found "incredible" Agent Porter's testimony that he was able to hear footsteps of persons running inside the trailer as he approached. He concluded that although he found "only slight evidence of doubtful character in the record that supports the finding of the trial judge that exigent circumstances existed prior to the breaking-in," he was nevertheless bound by those findings (*id.* at 14a-15a). Notwithstanding Judge Skelton's doubts, the resolution of this factual issue by the courts below was supported by the record, including the direct testimony of Agent Porter, which the district court chose to credit, and affords no occasion for further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635.

[5]The text of the supplemental charge is reproduced as an appendix to this brief.

verdict of guilty on both counts later that morning. Petitioner concedes (Pet. 11) that the charge here "tracked the language of" the instruction approved by the Fifth Circuit in *United States* v. *Bailey*, 468 F. 2d 652, affirmed *en banc*, 480 F. 2d 518, and comparison demonstrates that it followed this Court's opinion in *Allen* v. *United States*, 164 U.S. 492, faithfully.

Petitioner urges (Pet. 10-12) that this Court should resolve an apparent conflict among the courts of appeals regarding the validity of the traditional *Allen* charge and hold the charge to be unconstitutionally coercive. Four courts of appeals, in the exercise of their supervisory powers, have directed that the *Allen* charge not be given except in a substantially modified form. See *United States* v. *Angiulo*, 485 F. 2d 37 (C.A. 1); *United States* v. *Thomas*, 449 F. 2d 1177 (C.A.D.C.); *Government of the Virgin Islands* v. *Hernandez*, 476 F. 2d 791 (C.A. 3); *United States* v. *Chaney*, 559 F. 2d 1094 (C.A. 7). The Fifth Circuit, as noted above, continues to approve the *Allen* charge, *United States* v. *Bailey*, 480 F. 2d 518 (*en banc*). But no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. Moreover, all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict.

The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. *E.g.*, *Dyba* v. *United States*, No. 76-1731, certiorari denied October 3, 1977; *Perez-Vega* v. *United States*, No. 75-5937, certiorari denied, 424 U.S. 970; *Lee* v. *United States*, No. 74-6345, certiorari denied, 422 U.S. 1044.

3. Petitioner contends (Pet. 3, 15-19) that he was deprived of due process and a fair trial when "federal law enforcement officers deliberately gave misleading testimony concerning inducements given to a key prosecution witness and the federal prosecutor did not correct the false impression thereby created." In the circumstances of this case, however, the court of appeals correctly determined that the government's lack of candor could not have influenced the jury and, therefore, did not deprive petitioner of a fair trial. *Giglio* v. *United States*, 405 U.S. 150.

The background of petitioner's claim is as follows. When Italiano was arrested on October 29, 1975, he made a plea bargain in which he agreed to testify for the government regarding his heroin source.[6] DEA Agent LePore told Italiano that his cooperation would be reported to the United States Attorney (Pet. App. 5a). Italiano was later told by Officer Kelsey of the Orlando Police Department that his cooperation would be reported to the court as well (*id.* at 6a). In December of 1975, Italiano renounced his plea agreement, and he was subsequently tried and convicted on seven counts of distribution of heroin (*id.* at 5a-6a). While he awaited sentencing, Italiano met with Officer Goode of the Orlando Police Department; Goode promised Italiano that if he testified for the government, he (Goode) would inform the sentencing judge of Italiano's cooperation (*id.* at 6a). Italiano subsequently testified as a government witness. During cross-examination, he stated that he had not been "offered" or "promised" anything in return for

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[6]Italiano was informed that he could be charged with seven counts of distributing heroin, each count carrying a maximum penalty of 15 years' imprisonment (Pet. App. 5a).

his testimony, although he thought "it might go lighter" on him if he testified (Tr. 190-192).[7] He also testified that officers Kelsey and Goode had suggested they would try

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[7]The pertinent portions of Italiano's testimony were as follows (Tr. 190-192):

Q. Mr. Italiano, have you ever been offered anything in return for your testimony today?

A. No, sir.

Q. You have not. Are you saying, then, that by testifying you don't think it is going to do you any good at all?

A. Probably will.

Q. Probably will—in what terms. How do you think it is going to do you some good today?

A. I am not sure.

Q. Well, you have just said you thought it would do you some good.

A. Couldn't hurt.

Q. Couldn't hurt. Could you explain that, please.

A. Well, I have been subpoenaed to testify and I am here and I am testifying.

Q. I understand that. I understand that. But you said you expect you might get some benefit from your testimony today.

A. Benefit?

Q. Yes.

A. I have been convicted of sales of heroin.

Q. So then is that the benefit you are speaking of?

A. That is the possibility of benefit I am speaking of, yes.

Q. So, then, it might go lighter on you if you testify; is that right?

A. Yes.

* * * * *

Q. Have you been promised anything by either Agent

to "help [him] out" if he testified (Tr. 192). Officer Goode testified on cross-examination that he never approached Italiano about "a possible deal in exchange for his testimony" nor did officer Kelsey do so in his presence (Tr. 217). Kelsey testified on cross-examination that he never made any "overtures" to Italiano about what he might be able to do for him if he testified for the government (Tr. 256; Pet. App. 6a).

The district court denied petitioner's motion for a new trial, which was predicated upon the allegation that Italiano, Goode, and Kelsey had testified falsely regarding the inducements offered to secure Italiano's testimony. The district court concluded that Kelsey's and Goode's failure to acknowledge that Italiano had been promised that his cooperation would be made known to the sentencing judge did not warrant a new trial, since there was "no reasonable likelihood" that disclosure of this information would have affected the jury's verdict (Pet. App., 6a).[8] The court of appeals affirmed (*id.* at 5a-8a).

Kelsey or Agent Goode?

A. No.

Q. Now, they have never suggested to you that it would be in your best interest to testify today if they tried to help you out?

A. Yes.

Q. They have done that?

A. Yes, they have done that.

[8]The district court also found that during Italiano's initial plea bargaining, before he renounced the agreement in December of 1975, DEA Supervisor LePore had agreed to notify the prosecutor of Italiano's cooperation if he decided to testify for the government in petitioner's case (Pet. App. 6a).

In *Giglio* v. *United States, supra,* 405 U.S. at 154, this Court held that a new trial was required where a conviction was obtained by the knowing use of false testimony that " 'could * * * in any reasonable likelihood have affected the judgment of the jury * * *,' " quoting from *Napue* v. *Illinois,* 360 U.S. 264, 271. This standard was reiterated in *United States* v. *Agurs,* 427 U.S. 97, 103. The court of appeals held that the district court was correct in concluding that this case was subject to the *Giglio* standard, since the government witnesses had not been "candid" in their responses to defense counsel's questions, and the prosecutor had failed to correct their "evasive testimony" (Pet. App. 7a). Applying that standard, however, it concluded that there was no reasonable likelihood that full and truthful testimony on the dealings between the officers and Italiano could have altered the jury's verdict.

Petitioner asserts (Pet. 17-18) that *Giglio* goes further, requiring a new trial " 'wherever the nondisclosed evidence might reasonably have affected the jury's judgment on some material point, without necessarily requiring a supplementary finding that it also would have changed its verdict.' " *United States* v. *Butler,* 567 F. 2d 885, 890 (C.A. 9). This formulation is incorrect. The *Butler* court apparently misinterpreted the significance of this Court's reference to the jury's "judgment." The jury's judgment is its verdict, and the two terms are often used interchangeably. See, *e.g., United States* v. *Decker,* 543 F. 2d 1102, 1105 (C.A. 5), certiorari denied *sub nom. Vice* v. *United States,* 431 U.S. 906; *United States* v. *Sutton,* 542 F. 2d 1239, 1242-1243 (C.A. 4).

Indeed, in *Giglio* this Court expressly noted that "[w]e do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense *but not likely to have changed the verdict,*' " 405 U.S. at

154, quoting *United States* v. *Keogh*, 391 F. 2d 138, 148 (C.A. 2). The Court reiterated the standard established in *Napue* v. *Illinois*, *supra*, where the conviction had been reversed because the false testimony "may have had an effect on the outcome of the trial." 360 U.S. at 272. However deplorable the use of false or misleading testimony may be, the *Napue* and *Giglio* Courts recognized that, as with other errors of constitutional dimensions, there must be some likelihood of a material effect on the outcome of the trial before grounds exist for ordering a new trial.

Accordingly, the court of appeals correctly stated the issue in this case to be whether there was any reasonable likelihood that misleading testimony about the government's contacts with Italiano might have affected the jury's verdict. See *United States* v. *Sutton*, 542 F. 2d 1239, 1243 (C.A. 4) ("the jury's verdict might have been different had it known"); *United States* v. *Bynum*, 567 F. 2d 1167, 1170 (C.A. 1) (question is "whether * * * it is likely that the outcome would have been different"); cf. *Annunziato* v. *Manson*, 566 F. 2d 410, 414 (C.A. 2) (new trial upheld because truthful testimony "could have created a reasonable doubt that did not otherwise exist").

We agree with the court of appeals' condemnation of the conduct in this case (Pet. App. 8a). Nevertheless, its application of the *Giglio* standard was correct and in any event presents no issue meriting review by this Court. There was an ample factual basis to support the conclusion of both courts below that "a more candid disclosure" by the witnesses would not have affected the jury's verdict. Italiano himself had apprised the jury that he expected to benefit by testifying at petitioner's trial, and that both Kelsey and Goode had suggested to him that it would be in his best interest to testify (Pet. App. 7a). Thus, there would have been little or no added

impeachment value had the agents more fully disclosed their dealings with Italiano. Moreover, since petitioner's trial counsel testified at the hearing on the motion for a new trial that Italiano had informed him of the "pressures" to testify exerted on him by Agents Kelsey and Goode (N. Tr. 74-75),[9] he had sufficient information to cross-examine the agents in more detail on this point (Pet. App. 7a). Finally, Italiano did not recant any of his testimony, which directly implicated petitioner in the commission of the crimes and which was fully corroborated by the testimony of Terri Ovitt and of the surveillance agents, and by the results of the search (Pet. App. 7a-8a).

The apparent conflict in standards for awarding a new trial between *Butler* and the instant decision (and the cases cited above) does not require resolution by this Court at the present time. In the first place, the application of the *Butler* formulation in this case would not have produced a different result, since the court of appeals expressly found that Italiano's own testimony had apprised the jury of "any expectations on the part of Italiano which might have motivated him as a witness" (Pet. App. 8a). Accordingly, more candid testimony by Officers Goode and Kelsey would not have affected the jury's evaluation of Italiano's credibility or of any other material point. Moreover, as we have shown, the standard formulated in *Butler* is inconsistent with this Court's decision in *Giglio*, and we therefore believe it is uncertain that this erroneous formulation will be applied in future Ninth Circuit cases. Until it is, or until *Butler* is followed

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[9]"N. Tr." refers to the transcript of the hearing on the motion for a new trial.

in some other circuit, we think it is premature for this Court to undertake review for the purpose of reiterating or clarifying the *Giglio* standard.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

THE COURT: All right. I would like to give you this instruction.

Members of the Jury, in light of your report that you have been unable to agree on a verdict up to this time, the Court would like to give you this additional instruction.

While the verdict of a Jury must represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room.

The very object of the jury system is to secure unanimity by comparison of views and by arguments among the jurors themselves.

Each juror should listen with deference to the arguments of the other jurors and with a willingness to question his own judgment if he finds the larger majority of the jury takes a different view of the case than that which he himself takes.

No juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment or that he should close his eyes to the arguments of the other jurors who are equally as honest and intelligent as himself.

So I charge you that although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet you should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other.

It is your duty to decide this case, if you can conscientiously do so. No juror, however, is expected to do violence to his own conscious [*sic*]. You should listen with an open mind to each other's arguments.

If a much larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable doubt, which made no impression upon the minds of so many jurors equally as honest and intelligent as himself.

And now, if on the other hand a majority of you are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

And now, having given to you these additional instructions, it is my hope that you will return to the jury room and endeavor to reach a verdict. And with these instructions in mind, I'm going to now ask you to return to the jury room and consider further your verdict.

If after further deliberations you are still unable to reach a verdict you may so advise me through your Foreman.